103

(4)

Supreme Court, U.S.
FILED
OCT 7 - 2008
OFFICE OF THE CLERK

No. 08-269

In the Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v.

RICHARD RIVENBURGH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

LAWRENCE R. BAILEY, JR.
NOREEN DEWIRE GRIMMICK
Hodgson Russ LLP
677 Broadway, Suite 301
Albany, NY 12207
(518) 465-2333

EVAN M. TAGER
DAN HIMMELFARB
Counsel of Record
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

REPLY BRIEF FOR PETITIONER

1. This case presents two related questions: whether there is a "relaxed" standard of causation under the Federal Employers' Liability Act (FELA or the Act) and whether there is a "relaxed" standard of negligence under the Act. As the petition demonstrates, and as the *amicus* brief filed by the Association of American Railroads confirms, those questions are ripe for resolution by this Court. *First*, the standard of causation under FELA was left open in *Norfolk Southern Railway Co.* v. *Sorrell*, 127 S. Ct. 799 (2007), and addressed by four Justices in the case in two concurring opinions, which took different positions on the issue. *Second*, the lower courts are deeply divided on both the causation standard (as Justice Souter observed in his *Sorrell* concurrence) and the negligence standard (as the Second Circuit acknowledged in a prior case). *Third*, the "relaxed" standards are flatly inconsistent with this Court's settled interpretive methodology, reaffirmed in *Sorrell*, which deems FELA to have incorporated common-law principles unless the statute expressly says otherwise. *Fourth*, the standards for these two basic elements are at issue in all FELA cases (of which there are approximately 5,000 per year), at every stage of the litigation, and in all cases brought under the Jones Act. *Fifth*, the cases show that the choice of standard—common-law or "relaxed"—often determines the outcome.[1]

---

[1] We mistakenly stated in the petition (at 31) that the trial court in *Sievert* v. *CSX Transportation, Inc.*, No. CI0200504624, 2008 WL 3819782 (Ohio Ct. Com. Pl. June 22, 2008), granted summary judgment for the railroad. In fact, the court denied summary judgment for the plaintiff. It was in that context that

Respondent does not take issue with any of this. He does not deny that both of the questions presented in the petition have divided the lower courts or that one of them has divided this Court. He does not dispute that the questions arise in thousands of cases each year or that the differing standards routinely affect outcomes. And he offers no defense of the "relaxed" standards on the merits.

The sole contention in respondent's brief in opposition is that the Court should deny review because petitioner did not challenge the "relaxed" standards in the court of appeals. Br. in Opp. 2-8. That contention overlooks the fact that the court of appeals *actually decided* the issues raised in the petition. As explained below, that is sufficient to place the issues before this Court.

2. Respondent asserts that "an issue will not be addressed for the first time by the United States Supreme Court where it has not been properly advanced and preserved before the lower courts." Br. in Opp. 7-8. That is simply incorrect.

This Court's "traditional rule * * * precludes a grant of certiorari only when 'the question presented was not pressed *or* passed upon below.'" *United*

---

the court held, as the petition indicates, that the plaintiff was required to, but could not, establish proximate causation. The Ohio trial court's decision stands in stark contrast to a decision issued just last week in which a federal district court found similar evidence sufficient to support a verdict in the FELA plaintiff's favor under a relaxed "but for" causation standard. See *Magelky* v. *BNSF Ry. Co.*, ___ F. Supp. 2d ___, 2008 WL 4416754, at *3-*4 (D.N.D. Oct. 1, 2008) ("Evidence was presented during trial that a broken coupler caused the train to stop, that Magelky disembarked the train to investigate the problem, and that during the investigation she was injured.").

States v. *Williams*, 504 U.S. 36, 41 (1992) (quoting *id.* at 58 (Stevens, J., dissenting)) (emphasis added). The rule "operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon." *Ibid.* The Court has "never adhered" to a rule "limiting review to questions pressed by the litigants below." *Id.* at 42 n.2. On the contrary, it has repeatedly rejected that rule, finding in numerous cases that an issue not *pressed* below was properly before the Court because it had been *passed upon* below.[2] The authorities on which respondent relies (Br. in Opp. 8) are all cases in which the issue was neither pressed *nor* passed upon.[3] The Court's rule makes particular sense

---

[2] See *Stevens* v. *Dep't of Treasury*, 500 U.S. 1, 8 (1991) (declining to dismiss petition as improvidently granted because, although "petitioner did not * * * present the merits of the * * * issue to the Court of Appeals, * * * the Court of Appeals * * * decided the * * * issue"); *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) ("Respondents argue that this issue was not raised below. * * * It suffices * * * that the court below passed on the issue * * *."); *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 33 n.7 (1994) (per curiam) ("[In *Williams*] we applied [the] rule * * * which precludes our review of an issue that 'was not pressed or passed upon below.' Because the issue there had been passed upon by the lower court, we reviewed it.") (quoting *Williams*, 504 U.S. at 41) (citations and emphasis omitted); *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("[E]ven if this were a claim not raised by petitioner below, we would ordinarily feel free to address it, since it was addressed by the court below.") (emphasis omitted); *Verizon Commc'ms Inc.* v. *FCC*, 535 U.S. 467, 530-531 (2002) (rejecting "claim of waiver" because "[t]he Court of Appeals passed on [the] issue").

[3] See *MedImmune, Inc.* v. *Genentech, Inc.*, 127 S. Ct. 764, 776 (2007) (lower courts "gave no consideration" to the issue and respondents "raised the issue for the first time before this Court"); *Travelers Cas. & Surety Co. of Am.* v. *Pac. Gas & Elec. Co.*, 127

when, as here, the law in the relevant circuit is clear—"relaxed" FELA standards are firmly established by a line of Second Circuit decisions stretching back nearly a decade and a half (see Pet. 9 & n.2)—and urging a different position would be pointless because a panel has no power to overrule decisions of prior panels (see, *e.g.*, *In re Literary Works in Elec. Databases Copyright Litig.*, 509 F.3d 116, 122 (2d Cir. 2007)).

The questions presented in the petition are thus properly before this Court because they were passed upon by the court of appeals. The court below explicitly held that FELA "creat[es] a relaxed standard for negligence as well as causation" and that, "[m]easured by these standards," the evidence was sufficient to support a verdict in respondent's favor. Pet. App. 3a (quoting *Williams* v. *Long Island R.R. Co.*, 196 F.3d 402, 406 (2d Cir. 1999)).

Respondent nevertheless asserts that "[t]here is nothing in the Opinion [of the court of appeals] which discusses the validity or propriety of [the re-

---

S. Ct. 1199, 1207 (2007) ("we ordinarily do not consider claims that were neither raised nor addressed below"); *Hall Street Assocs., L.L.C.* v. *Mattel, Inc.*, 128 S. Ct. 1396, 1407 (2008) ("none of [this] has been considered previously in this litigation" and petitioner merely "suggested something along these lines in the Court of Appeals"). The remaining decision on which respondent relies, *Riegel* v. *Medtronic, Inc.*, 128 S. Ct. 999 (2008), states only that the petitioners did not raise the issue "in their briefs before the Second Circuit." *Id.* at 1011. But there is no indication that the court of appeals actually decided the issue either. See *id.* at 1006, 1011; *Riegel* v. *Medtronic, Inc.*, 451 F.3d 104 (2d Cir. 2006), aff'd, 128 S. Ct. 999 (2008). In any event, in *Riegel*, unlike in this case, the petitioners also failed to "raise th[e] argument in their petition for certiorari." 128 S. Ct. at 1011. That provided an independent ground for declining to decide the issue. See Sup. Ct. R. 14.1(a).

laxed] standards." Br. in Opp. 5. That is simply not true. By holding that FELA "creat[es] a relaxed standard for negligence as well as causation" (Pet. App. 3a), the Second Circuit necessarily decided that the relaxed standards are both "valid[]" and "prop[er]," as it has repeatedly done in prior cases (see Pet. 9 & n.2).

This Court has made clear, not only that it may address an issue that was passed upon below, even if it was not pressed, but that there is particular reason to do so when the issue is "one of importance to the administration of federal law," *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991), and "one placed in a state of flux by [a] split" between the decision below and other cases, *Verizon Commc'ns Inc.* v. *FCC*, 535 U.S. 467, 530 (2002) (citation omitted). That is manifestly the case here.

* * * * *

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

LAWRENCE R. BAILEY, JR.
NOREEN DEWIRE GRIMMICK
Hodgson Russ LLP
677 Broadway, Suite 301
Albany, NY 12207
(518) 465-2333

EVAN M. TAGER
DAN HIMMELFARB
Counsel of Record
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

OCTOBER 2008